

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. CATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

STATE OF WEST VIRGINIA, ex rel.,

G. ISAAC SPONAUGLE, III  
West Virginia citizen and taxpayer,

Petitioner,

v.

Civil Action No. 18-P-442  
Charles E. King, Jr., Judge

JAMES CONLEY JUSTICE, II,  
Governor of the State of West Virginia

Respondent.

**ORDER WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF  
COURT'S JULY 17, 2019, ORDER DENYING RESPONDENT'S MOTION TO DISMISS**

On June 5, 2019, came Petitioner, G. Isaac Sponaugle, III ("Petitioner"), pro se, and Respondent James Conley Justice, II, Governor of the State of West Virginia ("Respondent"), by counsel, for hearing on Respondent's motion to dismiss. On July 17, 2019, this Court entered an Order denying Respondent's motion to dismiss. As set forth in greater detail *infra*, Respondent thereafter filed a motion requesting that this Court enter a more detailed Order setting forth findings of fact and conclusions of law in support of its decision to deny Respondent's motion to dismiss, because Respondent intends to seek an extraordinary writ to challenge the Court's ruling. When such a request is made, this Court is obligated to enter an Order containing findings of fact and conclusions of law. See Syl. Pt. 6, State ex rel. Allstate v. Gaughan, 508 S.E.2d 75 (W.Va. 1998); State ex rel. Vanderra Res., LLC v. Hummell, 829 S.E.2d 35, 37 (W.Va. 2019). The Court granted Respondent's Motion for Entry of an Order Containing Findings of Fact and Conclusions of Law by Order dated October 21, 2019. Accordingly, the Court makes the following findings

of fact and conclusions of law in support of its decision to deny Respondent's motion to dismiss.

### **FINDINGS OF FACT**

1. On or about December 11, 2018, Petitioner filed a Petition for Writ of Mandamus against Respondent, in his official capacity as Governor of the State of West Virginia, asking this Court to order Respondent to "reside" at the seat of government during his term of office, and keep there the public records, books and papers pertaining to his office.

2. This Petition was based on Article VII, Section I of the West Virginia Constitution, which states as follows:

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

The Petition was also based on the corresponding statutory provision codified at West Virginia Code § 6-5-4, which states, in pertinent part, as follows:

The Governor, Secretary of State, state superintendent of free schools, Auditor, Treasurer, Attorney General and Commissioner of Agriculture, shall reside at the seat of government during their term of office, and keep there the public records, books and papers pertaining to their respective offices.

3. The Petition alleged that Respondent had not resided at the seat of government for more than 30 days during his term and that residing at the seat of government during his term is a mandatory, nondiscretionary constitutional and statutory duty.

4. On or about February 19, 2019, Respondent filed a motion to dismiss the Petition, arguing that Petitioner was not entitled to a writ of mandamus as a matter of law.

5. On June 17, 2019, this Court entered an Order which stayed all discovery until the Court ruled on Respondent's pending motion to dismiss.

6. On June 5, 2019, this Court held a hearing on Respondent's motion to dismiss.
7. On July 17, 2019, the Court entered an Order denying Respondent's motion to dismiss.

### CONCLUSIONS OF LAW

1. The West Virginia Supreme Court of Appeals has explained that "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." Mey v. Pep Boys-Manny, Moe & Jack, 717 S.E.2d 235, 239 (W.Va. 2011).

2. Accordingly, "courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." Sedlock v. Moyle, 668 S.E.2d 176, 179 (W.Va. 2008).

3. Nevertheless, dismissal for failure to state a claim is proper "where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Mey, 717 S.E.2d at 239.

4. Respondent's motion to dismiss required this Court to appraise the sufficiency of the Petition, and refrain from dismissing the Petitioner "unless it appears beyond doubt that the plaintiff can prove no set of facts to support [its] claim which would entitle [it] to the relief" sought. *See* State ex rel Smith v. Kermit Lumber & Pressure Treating Company, 200 W.Va. 221, 226, 488 S.E.2d 901, 906 (1997), quoting, Syl Pt. 3, Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977).

5. The West Virginia Supreme Court of Appeals has long held that a "[a] writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, State ex rel.

Kucera v. City of Wheeling, 170 S.E.2d 367 (W.Va. 1969).

6. In his Petition, Petitioner alleged (1) he is a citizen of the State of West Virginia which gives him the clear legal right to the relief he seeks; (2) the Respondent has a Constitutional and statutory duty to reside and keep public records at the seat of government; and (3) there is not any other adequate remedy.

7. A citizen and taxpayer may maintain a mandamus proceeding to compel any public officer to perform a nondiscretionary legal duty. Delardas v. County Court of Monongalia County, 155 W.VA. 776, 186 S.E.2d 847 (1972). Petitioner is a citizen and taxpayer of the State of West Virginia.

8. Mandamus will not be denied on the ground that there is another remedy unless such other remedy is equally convenient, beneficial, and effective. Hardin v. Foglesong, 117 W.Va. 544, 186 S.E. 308 (1936). Waiting for a future election and waiting an impeachment procedure to take place, alternative remedies Respondent argued were available to Petitioner, are not remedies that are as equally convenient, beneficial and effective as this mandamus action.

9. Petitioner alleged that there is a legal duty to do the thing which Petitioner seeks to compel. Respondent, however, sought to have this Court make the determination as to whether that duty is non-discretionary or discretionary. The Court believed that such determination was premature and that factual development would aid the Court in making such determination and related decisions. Respondent argued that the Petition should be dismissed because the phrase “reside” at the seat of government was not a specific, discrete, nondiscretionary duty that can be compelled through mandamus and that for that reason mandamus would not lie as a matter of law.

10. The purpose of a petition for writ of mandamus is to have a court compel a public

official perform a duty, i.e. to act. If the duty is non-discretionary, then the court in granting a mandamus petition will tell the public official to act, to perform the duty. Nobles v. Duncil, 202 W.Va. 523, 505 S.E.2d 442 (1998).

11. A non-discretionary duty is one that “is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]” Nobles v. Duncil, 505 S.E.2d at 453.

12. For example, the West Virginia Supreme Court found in Walter v. Ritchie, 191 S.E.2d 275, 283 (W.Va. 1972), that the West Virginia Department of Highways Commissioner (“highway commissioner”) had the non-discretionary duty to issue a renewal of a salvage yard operator’s license once a proper application and fee had been submitted. In Walter, the highway commissioner believed he had the discretion to decide whether to grant and/or renew such licenses. Id. at 283. The highway commissioner denied Mr. Walter’s request for a license renewal because his salvage yard was “an unsightly place and detracted from the surrounding community.” Id. at 277. The Court, after examining the statute at issue, found the highway commissioner’s authority to regulate certain salvage yards, like the one owned by Mr. Walter, was limited to only the issuance and renewal of the annual license. Id. at 282. Because Mr. Walter had complied with the statutory requirements of submitting a proper application and fee, the Court awarded the writ of mandamus to compel the highway commissioner to issue Mr. Walter a renewal license to operate his salvage yard. Id. at 283.

13. The duty can also be discretionary in nature, meaning the public official has discretion in how that duty is performed. In granting a mandamus petition in such cases, the court will tell the public official to act, to perform the duty, but the court cannot tell the official how to perform that duty, i.e. how to exercise his/her discretion. Nobles v. Duncil, 505 S.E.2d at

453.

14. In Nobles, the appellants alleged that the circuit court exceeded its authority in a mandamus action by prescribing how prison officials were to carry out their discretionary duties. Id. at 444. The circuit court found that certain conditions at the Huttonsville Correctional Center violated constitutional standards and ordered the correctional center to follow very specific steps to correct those violations. Id. at 446. The West Virginia Supreme Court found that the circuit court exceeded its powers in a mandamus action by prescribing how prison officials were to carry out their discretionary duties. Id. at 454. The circuit court had ordered the specific manner in which the appellants were to conduct inmate disciplinary hearings and to provide medical services. Appellants argued that the law is clear that “where an official is to perform a discretionary duty, mandamus will lie only to compel the exercise of the duty and not to compel the specifics of the performance.” Id. at 453. The Supreme Court agreed finding that the circuit court exceeded its powers in mandamus “by prescribing how prison officials are to carry out their duties.” Id.

15. Mandamus is a proper remedy to compel the performance of duties that are non-discretionary and discretionary in nature. Id. at 454. If the Court ultimately determines that the duty at issue is a discretionary duty as the Respondent has argued, mandamus will lie to require that discretion be exercised, provided discovery shows that the Respondent is not already exercising his discretion. Mandamus cannot be used to control the manner in which discretion is exercised.

16. Assuming all of the alleged facts contained in Petitioner’s Petition to be true, as this Court is required to do, the Petitioner sufficiently pleaded and provided theories under which relief could be granted. This Court believed that claims set forth in the Petition for Writ of

Mandamus were sufficient to withstand a motion under West Virginia Rule of Civil Procedure 12(b)(6). For these reasons, this Court on July 17, 2019, entered an Order that denied Respondent's Motion to Dismiss.

The Court does **FURTHER ORDER** that a certified copy of this Order be sent to all parties or counsel of record.

The Court notes the objection and exception of the party or parties aggrieved by this Order.

Entered this 21<sup>st</sup> day of October, 2019.

  
CHARLES E. KING, JR., JUDGE

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY  
AND BY SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN TO ME BY THE CLERK OF SAID COURT. THIS  
DAY OF October 2019  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 14